FORM NLRB-5026
(5-78)

Release

Datz

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

177-1633-5075 578-4087
518-4030-9000 584-6200
530-2050-1200
530-8059

A.D. 05141

TO : Winifred D. Morio, Director
Region 2

DATE: SEP 30 1980

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Jou-Jou Designs, Inc.
Case 2-CA-17160

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This case has been submitted to Advice as it involves novel issues of law peculiar to the garment industry. The specific issue submitted is whether an Employer violates 8(a)(2) or (5) of the Act by repudiating a jobber's agreement with one union and entering into a jobber's agreement with another union which is the Section 9(a) representative of its inside employees.

FACTS

Jou-Jou Designs, Inc. (herein Jou-Jou or Employer) is a manufacturer of juvenile clothing and apparel. Jou-Jou has six employees in its inside shop employed as shipping and receiving clerks and sample pattern designers.

In keeping with the common practice of the garment industry, Jou-Jou ships sample patterns or garments, together with material and manufacturing specifications, to outside contractors whose employees perform all the actual production work on a piece rate basis. The outside contractor sets all terms and conditions of employment of its own employees with the exception of determination of the piece rate per garment which is negotiated on an ad-hoc basis between Jou-Jou and the 9(a) representative of the outside employees. 1/

Apart from the setting of piece rates, Jou-Jou does not determine the working conditions of the production employees of the outside contractors. Nor do Jou-Jou and those contractors have common ownership, common control of the operations, common control of labor relations or more substantial integration of the operations than is usual in the garment industry.

1/ In addition, Jou-Jou makes the required contributions to the health and benefit funds for those unionized employees of the contractor engaged in the production of garments for Jou-Jou.

On May 5, 1978, Jou-Jou and Knitgood Workers' Union, Local 155, International Ladies Garment Workers' Union, AFL-CIO, (herein Local 155) entered into a jobber's agreement effective May 5, 1978 through July 31, 1979, 2/ and from year to year thereafter absent 60 days' notice of intent to modify or terminate. The principal term of Local 155's jobber's agreement provided that the Employer would use only contractors having collective bargaining agreements with Local 155, absent Local 155's permission. 3/ The jobber's agreement did not regulate the terms and conditions of employment of the "inside" employees of Jou-Jou.

On May 11, Local 155 gave notice of its intent to modify the jobber's agreement thereby triggering the July 31 termination provision. In addition, Local 155 requested bargaining concerning the six previously unrepresented inside employees of Jou-Jou whom Local 155 now claimed to represent. On July 3, the Employer and Local 155 reached agreement on the terms of a collective bargaining contract covering the inside employees as well as an agreement on the terms of a new jobber's agreement. 4/ On July 9, prior to the reduction of any agreement to writing, Local 5A of the General Trades Employees, United Brick & Clay Workers, AFL-CIO (herein Local 5A) filed an RC petition for the unit of inside employees. Local 155 disclaimed interest in representation of the unit of inside employees.

The Employer and Local 155 soon disagreed as to the effect of the pending RC petition and Local 155's subsequent disclaimer of interest on the continued validity of the jobber's agreement. The Employer took the position that the prior jobber's agreement would expire by its terms on July 31 without renewal. The Union took the position that the jobber's agreement stood separate and apart from the issue of the representation of Jou-Jou's inside employees and further took the position that the jobber's agreement had, in fact, been renewed. Both parties have adhered to their respective positions.

2/ Unless otherwise indicated, all events occurred in 1979.

3/ The jobbers agreement also contains a liquidated damages provision for breach of the union shop contractor clause as well as a provision prohibiting the declaration of a strike against the Employer absent Employer non-compliance with the terms of a binding arbitration award. In addition, the agreement obligates the Employer to make contributions to the health and benefit funds on behalf of the contractor's unit employees.

4/ It is not clear whether Jou-Jou and Local 155 envisioned executing one agreement encompassing terms and conditions of employment for the inside employees as well as the traditional terms of the jobbers agreement or whether the parties contemplated execution of two separate agreements.

On August 7, after a duly conducted Board election, Local 5A was certified as the 9(a) representative of the inside employees. That same day, the Employer executed a jobber's agreement with Local 5A, the terms of which were virtually identical to Local 155's jobber's agreement with the exception that the Employer was now required to contract only with shops having contracts with Local 5A. There is no evidence that Jou-Jou gave notice of the execution of the new jobber's agreement to Local 155. Local 155 asserts that it only became aware of Local 5A's jobbers agreement in March of 1980 when a dispute arose between one of Jou-Jou's contractors, Tomlino Inc., and one of Local 155's sister ILG Locals.

On March 27, 1980, Local 155 filed the instant 8(a)(1), (2) and (5) charge alleging that Jou Jou had refused to bargain collectively with Local 155 with whom it had a jobber's agreement; that Jou-Jou dominated and interfered with the administration of Local 5A; and that Jou-Jou entered into a jobber's agreement with Local 5A at a time when Local 5A was not the majority representative of the employees of some of Jou-Jou's contractors, including contractor Tomlino, Inc. In addition, on April 10, 1980, Local 155's International, the ILGWU, commenced a proceeding under Article XX of the AFL-CIO Constitution charging that Local 5A had violated the established bargaining relationship and the established work relationship between Jou-Jou and Local 155. The Article XX complaint proceeding is presently pending. 5/

ACTION

It was concluded that the instant case should be dismissed, absent withdrawal.

With regard to the 8(a)(5) charge, it was noted that Local 155 is not the 9(a) representative of Jou-Jou's inside employees. Indeed Local 155 had specifically disclaimed any interest in their representation. Although Local 155 is the 9(a) representative of the employees of some of Jou-Jou's contractors, there is no evidence that Jou-Jou and the contractors are joint employers of these employees. 6/ Concededly, Congress has

5/ See also Jou-Jou Designs v. ILGWU, 104 LRRM 2846 (1980), an ancillary case arising from the invocation of the Article XX proceeding, for a further description of surrounding facts.

6/ Compare Great Chinese American Sewing Company, 227 NLRB 1670 (1977); Triumph Curing Center, Inc., 222 NLRB 627 (1976); Crystal Springs Shirt Corporation, et al., 245 NLRB No. 112 (1979).

recognized that these employers have a close relationship, and has therefore created certain "garment industry" exemptions to Section 8(b)(4)(B) and 8(e). However, this is not to say that Congress has expressed the view that these employers are to be treated, in law, as joint employers. The Board has rejected that view. 7/ Further, the fact that Jou-Jou negotiates piece rates with the union representing the contractor's employees does not, standing alone, establish a joint employer relationship. 8/

In the absence of a 9(a) relationship, there is no statutory obligation for the Employer to meet and bargain in good faith with Local 155 concerning the terms and conditions of employment of unit employees. 9/

Further, the alleged contractual obligation involved herein, i.e. the obligation to deal only with Local 155 signatories, is not addressed to the labor relations of Jou-Jou's unit employees. Thus, any agreement between Jou-Jou and Local 155 would not be subject to mandatory bargaining.

Accordingly, Local 155 does not represent Jou-Jou's employees and the alleged contractual term does not govern their employment. Thus, even assuming, arguendo, that Jou-Jou did abrogate an extant oral jobbers agreement with Local 155 by entering into a jobbers agreement with Local 5A, such conduct would not violate Section 8(a)(5) of the Act. 10/

7/ See n. 12 infra, and accompanying text.

8/ See Joint Board of Coat, Suit and Allied Garment Workers' Unions, ILGWU, AFL-CIO (Hazantown, Inc.), 212 NLRB 735 (1974) and San Francisco Joint Board International Ladies' Garment Workers' Union, AFL-CIO (San Francisco Shirt Works, Inc.), 218 NLRB 805 (1975), discussed more fully infra, where the Board rejected joint employer status even though the jobber in both cases negotiated piece rates applicable to the contractor's employees.

9/ N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958); cf. Mine Workers v. Pennington, 381 U.S. 457, 666 (1965).

10/ Cf. Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

With regard to the Section 8(a)(2) allegation, no evidence of unlawful Employer domination or interference with Local 5A has been presented. With regard to an allegation that the Employer unlawfully assisted Local 5A, the only Employer action herein has been the execution of and continued maintenance of a jobber's agreement with Local 5A. 11/ While it is no doubt true that an agreement by a jobber that it will contract only with unionized contractors may assist the contracting union in its campaign to organize employees of the various contractors, the garment industry proviso to Section 8(e) expressly exempts such agreements from the proscriptions of 8(e) and 8(b)(4)(B) of the Act.

Nor are such agreements to be condemned under Section 8(a)(2). Such agreements do not impose Local 5A on a contractor's employees. These employers are free to select Local 5A, any other union, or no union. Admittedly, if they choose to be represented by Local 5A, their employer will become eligible to become a Jou-Jou contractor. However, if their employer coerces them to be represented by Local 5A, that conduct is to be condemned via a Section 8(a)(2) charge against their employer. Admittedly, the jobber's agreement may encourage these employees to choose Local 5A, for that is the only way that their employer, and hence they, can get the work. However, this fact is but a consequence of the jobber's agreement itself and that agreement is based on legitimate considerations. In this regard, analysis of the legislative history of the garment industry proviso clearly indicates that Congress intended, by enactment of the proviso, to preserve the historical organizing pattern within the garment industry. Such organizing pattern, which included the execution of jobber's agreements, was viewed as an effective means of preventing low wages and sweatshop conditions in an industry characterized by highly competive yet often underfinanced contractors operating out of lofts. 12/ Further, the Board has indicated that the protection

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11/ Although the execution of the Local 5A jobber's agreement occurred outside the 10(b) period, it is not clear that the Charging Party had notice thereof more than six months preceding the filing of the charge. Such notice may be required to successfully assert the Section 10(b) defense. AMCAR Division, ACF Industries, Incorporated, 234 NLRB 1063 (1978); Alabaster Lime Company, Inc., 194 NLRB 1116, 1118 (197 . Accordingly, this authorization to dismiss does not rest on 10(b) grounds.

12/ See legislative history discussion concerning the 1959 enactment of the garment industry proviso reprinted in II Leg. Hist. at 1384-1385; 1446; 1576; 1680; 1708; 1736-1737; 1829. See also Hazantown, Inc., supra at 738. Also note Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 633 n. 13 (1975) in which the Supreme Court cited Danielson v. Joint Board 494 F. 2d 1230 (C.A. 2, 1974), for the conclusion that the text of the garment industry proviso and the treatment in congressional debates and reports suggest that Congress intended to authorize garment workers' unions to continue using subcontracting agreements as an organizational device.

accorded jobber's agreements by the garment industry proviso is a broad one, not subject to direct attack under other sections of the Act. Thus, in Joint Board of Coat, Suit and Allied Garment Workers' Unions, ILGWU, AFL-CIO (Hazantown, Inc.), supra, the Board held that a union which pickets a jobber for more than 30 days without filing a representation petition for the sole purpose of obtaining a jobber's agreement does not violate 8(b)(7)(C) of the Act as such picketing lacks a recognitional or organizational purpose. 13/ In so holding, the Board disagreed with the General Counsel's theory that a jobber and a contractor in the traditional jobber/contractor relationship constitute joint employers of the contractor's employees. 14/

The Board further noted in Hazantown, Inc., that the "expressed intent of Congress to treat garment industry unions more leniently under one section of the Act" cannot be "regarded as a license to treat them more harshly under another." 15/ In the instant case it was concluded that the Board's analysis in Hazantown, Inc. and San Francisco Shirt Works, Inc., supra, is applicable by analogy herein in finding that execution of a traditional jobber's agreement does not constitute "assistance" within the meaning of Section 8(a)(2) of the Act. Thus, in the absence of evidence indicating a closer relationship than that of a jobber and its contractors, such as indicia of joint employer status not present herein, the Section 8(a)(2) allegation should be dismissed, absent withdrawal. Any other result would effectively negate the protection accorded to jobber's agreements by the garment industry proviso and would thus render inconsistent differing provisions of the Act.

H.J.D.

13/ See also San Francisco Joint Board International Ladies' Garment Workers' Union, AFL-CIO (San Francisco Shirt Works, Inc., supra.

14/ Hazantown, Inc., supra, 736-737.

15/ Ibid, at 738.